IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA.

Civil Revision No. 352 of 2000.

Judgement reserved on : November 28, 2006.

Date of Decision: **December 08 , 2006**.

Rajinder Kumar Sharma .....Petitioner.

Versus

Smt. Kanta Kumari ……Respondent.

Coram

The Hon'ble Mr. Justice V.K. Gupta, Chief Justice.

Whether approved for reporting?[1] Yes

For the Petitioner: Mr. Kuldip Singh, Sr. Advocate, with M/s Bimal Gupta, Karan Singh Kanwar, Harmeet Singh & Navlesh Verma, Advocates.

For the Respondent: Mr. Bhupender Gupta, Sr. Advocate with M/s Neeraj Gupta & Janesh Gupta, Advocates.

V.K. Gupta, C. J. :

This Revision Petition under Section 24(5) of the H.P. Urban Rent Control Act, 1987 (1987 Act: for short) has been filed by the petitioner-tenant against the respondent- landlady against judgment dated 24th August, 2000 passed by the learned Appellate Authority (1), Sirmaur District at Nahan in Rent Appeal No.17-CMA/14 of 1999 arising out of the judgment dated 21st September, 1999 passed by the Rent Controller,

[1] Whether Reporters of Local Papers may be allowed to see the judgment?

Court No.1, Paonta Sahib, in Rent Petition No. 2/2 of 1997. Both the Courts below have ordered the eviction of the tenant- petitioner from the shop in question.

It is a common ground between the parties in this petition before me that the only question which requires adjudication by this Court is with respect to the issue of change of user of the shop in question by the petitioner. Mr. Kuldip Singh, learned Senior Advocate appearing for the petitioner did not raise any other issue or question because the learned counsel for the parties submitted and agreed that this is the only issue or question which has come up for adjudication in this petition.

The brief facts leading to the filing of this petition are that a small shop measuring 10 ft. x 12 ft., being property No. 35/3 situate in Ward No. 8, Devi Nagar, Paonta Sahib was taken on rent by the petitioner. The relationship between the petitioner and the respondent as tenant- landlady is not in dispute. The rent note as duly executed between the parties and also admitted by them, in Clause (3) thereof does provide that the tenant shall do the business of "*Kariyana*" (general merchandise) in the shop in question and without the permission of the landlady shall not carry out any change in the business being conducted by him in the said shop. Even though the rent note is in Hindi, English translation of Clause (3) (this being the only Clause relevant for our purpose) reads thus:-

> "(3) That the tenant shall conduct the business of *Kariyana* (general merchandise) in the shop in question. Without the permission of the landlady he shall not change his business in the said shop in any manner."

The allegation of the respondent in the eviction petition was that he had changed the business from "*Kariyana*" to that of a tea shop. To

understand and properly appreciate the correct perspective in which the grounds of eviction raised as well as its basis, it shall be advantageous to take note of the relevant pleadings of the parties in reference thereto.

Para 18(a) containing five grounds, being grounds No. (i), (ii), (iii), (iv) and (v) reads thus:-

" 18(a) The grounds on which the eviction of the tenant is sought:

(i) That the respondent who had entered into an agreement to pay one month's rent in advance as per the rent deed dated 1.7.1980, but the respondent, has as a matter of habit, failed to pay one month's rent in advance and is presently paying the rent after the lapse of the English calendar month. He has withheld the payment of rent pertaining to the months of March and April, 1997.

(ii) That the shop in question was rented out to the respondent for running a Kariyana shop and had undertaken not to make any additions or alterations in the shop and that he would not cause any damage to the same. But the respondent has without the consent and permission of the petitioner has projected a tin shade of 6' x 10' in dia from the shop in question in such a manner that this projected shade has covered a considerable area belonging to the Municipal Council, Paonta Sahib. The aforesaid projection was carried out during the night hours of 15th February, 1997 and while extending the projection, the respondent through his labour, had dug a considerable portion of the shop on both sides with great force whereby cracks have appeared at a number of places in the wall. The affixation of the shade has impaired the building of the petitioner and its value has diminished considerably. Since the aforesaid shop had already been covered by a cement slab by the petitioner which is about 3' wide, therefore, there was no justification for the raising of the unauthorized shade.

(iii) That on account of the unauthorized and illegal encroachment over the Municipal Council's land by raising the aforesaid shade, the respondent has caused nuisance to the occupiers of the buildings in the neighbourhood as well as to the public at large passing through the main road.

(iv) That the respondent is now running a tea shop in the demised premises. While preparing the tea, the floors of the demised shop, are being damaged on account of burning of fire. It has also caused risk to the entire building as the fire can break out at any moment. The walls and floors etc. are blackened on account of smoke etc. and thus the life of the building is being deteriorated.

(v) That the respondent is running shop in the early hours of the morning and while opening the shop, disturbs the sleep of the family members of the petitioner and adjoining neighbours on account of the lifting of the shutter which produces great noise and which has become a permanent nuisance. Had the respondent used the shop for Kariyana purpose, he would have opened the same at about 9 A.M."

Para 5 of the Eviction Petition being also relevant for our purposes is reproduced herein below verbatim. It reads thus:-

"5. In case of residential premises the number of persons occupying the same and in the case of non-residential premises, the purpose for which they are used and the number of employees, if any, working therein	The aforesaid shop was let out by the predecessor-in-interest of the petitioner for running a Kariyana shop. He has presently employed a servant and has changed the user without the consent and prior permission of the petitioner."

Para 5 of the written statement filed by the petitioner in answer to the aforesaid para 5 of the Eviction Petition reads thus:-

> "That in reply to Para No.5 of the petition, it is submitted that the respondent is running a tea-shop. There is no question of change of user. The running of the tea-shop is with the consent and approval of the petitioner."

Para 18(a) of the written statement reads as under:-

"18(a)(i) That para No. 18(a)(i) of the petition is not admitted to be correct and hence denied. The rent is payable in every month and the respondent has been paying the rent regularly.

18(a)(ii) That para No. 18(a)(ii) of the petition is not admitted to be correct and hence denied. The respondent is running a tea shop, for the last over 7 years with the consent and approval of the petitioner. The fixation of tin shade projections have been raised by all the shop-keepers and there is no question of any damage to the property of the petitioner. It is denied that the projection was carried out in the night of 15.2.1997 or that considerable portion of the shop was dug or cracks have appeared in the wall. It is vehemently denied that the fixation of the sun-shade has impaired the building and decreased its value etc. The fixation of the sun shade is in fact enhanced the value and utility of the shop. Prior to the present sun shade, earlier sun shade, which has been damaged due to the rains.

18(a)(iii) That Para 19(a)(iii) of the petition is not admitted to be correct and hence denied. There is no unauthorized or illegal encroachment nor there is any nuisance to the public at large.

18(a)(iv) That para No. 18(a)(iv) of the petition is not admitted to be correct and hence denied. The respondent prepares tea from L.P.Gas stove. It is vehemently denied that

floor of the premises has been damaged on account of burning of the fire, or that risk, is caused to the building, as the fire may broke out or that the walls and floor have gone blackened or that the life of the building lessoned. All these allegations are only figment of imagination. The shop in question is in very good shape. There is no question of any smoke in the shop. There is no damage to any part of the premises in question. Only the L.P.G. stove is used for the preparation of the tea and there is no question of any apprehension of fire. The petitioner herself runs the kitchen and uses gas. The allegations are misplaced and false."

Based on the aforesaid pleadings, the following five issues were framed by the learned Rent Controller:-

" 1. Whether the respondent is a habitual defaulter in payment of rent, as alleged? OPP
2. Whether the respondent has made material additions and alterations and has impaired the value and utility of the building in question, as alleged? OPP
3. Whether the respondent has changed the user of the shop in question i.e from Kariyana shop to tea shop and has caused damage and deterioration to the building as alleged? OPP
4. Whether the respondent is causing permanent nuisance to the petitioners and adjoining neighbours as alleged? OPP
5. Relief.

Issue No.3 alone being relevant for our purposes, it is to be noted that both the Rent Controller as well as the learned Appellate Authority even though decided this issue against the petitioner yet they did not, while deciding this issue hold that because of the change of the user of the shop any damage or deterioration to the building has been caused.

Actually, issue No.4 which speaks of the petitioner causing permanent nuisance to the respondent (landlady) as well as adjoining neighbours was also decided by both the Courts below against the respondent.

Section 14(2)(ii)(b) relates to the ground of eviction of a tenant from a property if the tenant, without the written consent of the landlord has used the building for a purpose other than for which it was leased. The relevant extract of this Section reads thus:-

> " 14(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied—
>
> (i) …… …… ……
>
> (ii) that the tenant has after the commencement of this Act without the written consent of the landlord –
>
> (a) …….. …….. ……
>
> (b) used the building or rented land for a purpose other than that for which it was leased, or
>
> (iii) …… ……. ……
>
> (iv) …… ……. ……
>
> (v) …… ……. ……
>
> the Controller may make an order directing the tenant to put the landlord in possession of the building or rented land and if the Controller is not so satisfied he shall make an order rejecting the application. ……..."

The evidence brought on record by the parties does clearly suggest that indeed the petitioner had admitted doing the business of making and selling tea in the shop in question, thus admitting about the change of user of the shop from *"Kariyana"* to tea. Since this fact of the petitioner having changed the user of the shop has been admitted by the petitioner both in the written statement filed by him as well as in the

course of evidence adduced by him before the learned Rent Controller, the onus to prove and establish that this change of user was with the written consent of the landlady was upon the petitioner.

A bare look at Clause (ii) of sub-section(2) of Section 14 of 1987 Act clearly suggests, without an iota of doubt and without any ambiguity that even though the onus initially is upon the landlord to aver, plead as well as prove and establish the fact that the tenant has used the building for a purpose other than for which it was leased but once this fact is either admitted by the tenant or it gets established and proved, the onus shifts upon the tenant to prove and establish that the change in user of the building was made by him with the written consent of the landlord. In the present case, at the risk of reiteration it is to be observed and seen that since the tenant did not dispute either in the pleadings or in the evidence about the change of user, it was up to him to establish and prove that it was done with the written consent of the landlady. He did not do so. Therefore, it clearly means that the change of user from *Kariyana* business to making and selling of tea without the written consent of the landlady is a fact which has to be treated as having been established in this case.

In the case of ***Gurdial Batra*** vs. ***Raj Kumar Jain*** reported in ***1989 (3) SCC 441*** in which also the eviction of a tenant was sought on the ground of change of user and wherein the allegation against the tenant was that he had changed the user of the shop from the business of repairing of Cycles and rickshaws to the business of selling Televisions, their Lordships of the Supreme Court held as under:-

"Letting of a premises can broadly be for residential or commercial purpose. The restriction which is statutorily provided in Section 13(2)(ii)(b) of the Act is obviously one to protect the interests of the landlord and is intended to restrict the use of the landlord's premises taken by the tenant under lease. It is akin to the provision contained in Section 108(o) of the Transfer of Property Act dealing with the obligations of a lessee. That clause provides:

> The lessee may use the property and its products, if any, as a person of ordinary prudence would use then if they were of his own; but he must not use or permit another to use the property for a purpose *other than that for which it was leased*…..

A house let for residential purpose would not be available for being used as a shop even without structural alteration. The concept of injury to the premises which forms the foundation of clause (b) is the main basis for providing clause (b) in Section 13(2)(ii) of the Act as a ground for the tenant's eviction. The Privy Council in *U Po Naing v. Burma Oil Co.* [AIR 1929 PC 108] adopted the same consideration. The Kerala High Court has held that premises let out for conducting trade in gold if also used for a wine store would not amount to an act destructive of or permanently injurious to the leased property [*Raghavan Pillai v. Sainaba Beevi, 1977 Ker LT 417*]. Similarly, the Bombay High Court has held that when the lease deed provided for user of the premises for business of fret work and the lessee used the premises for business in plastic goods, change in the nature of business did not bring about change of user as contemplated in Section 108(c) of the Transfer of Property Act [*1978 Mah LJ 545*].

The landlord parts with possession of the premises by giving a lease of the property to the tenant for a consideration. Ordinarily, as long as the interest of the

> landlord is not prejudiced, a small change in the user would not be actionable."

Similarly, in the case of ***Mohan Lal*** vs. ***Jai Bhagwan*** reported in ***1988(2) SCC 474*** in which also the eviction of the tenant was sought on the ground of change of user by alleging that the tenant had changed the business of selling liquor to general merchandise, it was held as under:-

> " While respectfully agreeing with the said observations of Lord Diplock, that the Parliament legislates to remedy and the judiciary interpret them, it has to be borne in mind that the meaning of the expression must be found in the felt necessities of the time. In the background of the purpose of rent legislation and inasmuch as in the instant case the change of the user would not cause any mischief or detriment or impairment of the shop in question and in one sense could be called an allied business in the expanding concept of departmental stores, in our opinion, in this case there was no change of user which attract the mischief of Section 13(2)(ii)(b) of the Act. The High Court, therefore, was in error."

The juridical philosophy propounded in the aforesaid proposition of law in ***Gurdial Batra*** vs. ***Raj Kumar Jain*** (supra) is this:-

A property let out for residential purpose cannot be used as a shop even without any structural alteration. But if a property is let for commercial purpose, despite the fact that the commercial purpose is specified, unless there is an element of injury to the premises, using of the property for a purpose other than for which it was let out would not be a ground for eviction of the tenant. In ***Gurdial Batra*** **vs.** ***Raj Kumar Jain*** (supra), their Lordships, therefore, introduced a conceptual theory of injury to the property. Citing the judgment of Privy Council in ***U Po***

Naing *vs.* ***Burma Oil Co.*** (**AIR 1929 PC 108**) and relying upon the judgment of Kerala High Court (in *Raghavan Pillai* vs. *Sainaba Beevi,* 1977 Ker LT 417) and a judgment of Bombay High Court, their Lordships very clearly held that the change of user from one commercial activity to another commercial activity cannot be a ground for eviction unless such a change of user would be destructive or permanently injurious to the leased property.

Similarly, in ***Mohan Lal*** vs. ***Jai Bhagwan*** (supra) citing the observations of Lord Diplock about the legislative intendment, their Lordships clearly held that unless any mischief or detriment or an impairment is caused to the shop in question, the change of user by itself from one commercial activity to another commercial activity cannot be a ground for eviction of the tenant. Culling the aforesaid ratio in the aforesaid two judgments and applying the same to our case, I have no hesitation in holding that there is a clear nexus between the concept of change of user (provided the activity remains either commercial or business, as the case may be) and any injury or impairment caused to the property or any prejudice caused or likely to be caused to the landlord because such a nexus alone can be made the basis of the eviction of the tenant. Otherwise in ordinary prudence and in normal circumstances merely because a tenant changes his commercial activity from one business to another for any reason, this should not be by itself a ground for eviction. It is very commonly understood in the mercantile world that even though a tenant may have obtained a shop on lease for a particular and specified commercial activity, either because of the reason of his failure in that activity or changes in the economic scenario, he may have to

put that commercial activity to an end and to earn his livelihood by starting another commercial activity in the same shop. After all, a businessman cannot be compelled to carry on with a particular commercial activity even if he feels it to be non-viable, non-manageable or non-profitable. Every businessman has a right to carry on a business of his choice. Merely because for the reasons best suited to him he undertakes a change in commercial activity, this by itself should not be a ground of his eviction from the shop. As noticed above, the change of user has to be clearly linked, and inseparably coupled with, an element of injury or impairment of the shop or causing any prejudice or having the potential of prejudice, to the landlord.

In the light of the aforesaid ratio laid in the above mentioned two judgments of the Supreme Court, let us apply the facts of this case to find out whether the change of user of the shop by the petitioner from selling Kariyana items (general merchandise) to making and selling tea has the potential of causing any prejudice or detriment to the interests of the respondent or does it create any mischief in so far as the user of the shop as a tea stall is concerned or has any injury been caused to the respondent- landlady by the conduct of business of making and selling of tea in the shop?

PW 3 Yashwant Kumar Gupta is the husband of respondent-landlady and in his capacity as her general power attorney holder appeared as a witness in the case. He stated that the trade of making and selling tea can give rise to a fire incident in the shop and the floor as well as walls of the shop also can be damaged. He also stated that since the petitioner opens the shop at 3.30 a.m. or 4.00 a.m. and opens it by

operating a rolling shutter it causes nuisance. As against this statement of the respondent, the petitioner who appeared as his own witness clearly deposed that he makes the tea in the shop by using a gas burner. Actually the stand of the petitioner in the written statement filed by him before the Rent Controller also was that tea is made by him in the shop by using a gas burner. Not only this, another witness who appeared on behalf of the respondent, namely, PW 5 Sunder Lal Aggarwal deposed that the petitioner apart from making tea, sells some items of general merchandise (Kariyana) in the shop. He went on to depose that the petitioner sells toffees, biscuits and cigarettes etc. Whether or not, the business of making and selling tea is akin or ancillary to the business of selling Kariyana items, the fact remains that the making and selling of tea does not have the potential of causing any injury or prejudice or detriment to the respondent. Neither has the evidence adduced by the respondent conclusively brought on the record any fact of any damage suffered by the respondent on the floor or the walls of his shop nor can it be said that merely by making tea through the help of a gas burner is there any likelihood of the walls or the floor of the shop being damaged in any manner.

Even though therefore the petitioner has changed the user of the shop from selling *Kariyana* items to the making and selling tea, because of the aforesaid ratio in the above mentioned two judgments of the Supreme Court since this change of user neither causes nor has the potential of causing any injury or prejudice or detriment to the respondent or her interests, the petitioner cannot be evicted on this ground from the shop in question.

For the foregoing reasons, this petition is allowed and the judgment impugned herein is set aside with all the consequences.

December 08 , 2006. **(V.K. Gupta), C.J.**
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